



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1614

RIN 3046-AB23

Federal Sector Equal Employment Opportunity

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice of Proposed Rulemaking

SUMMARY: The Equal Employment Opportunity Commission (“EEOC” or “Commission”) is proposing revisions to its federal sector complaint processing regulations explicitly to provide for the digital transmission of EEO hearing and appellate documents, and to address the use of the Commission’s Electronic Public Portal.

DATES: Comments on the Notice of Proposed Rulemaking (hereinafter “NPRM”) must be received on or before [INSERT DATE 60 days after the date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN Number 3046-AB23, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.
- Fax: (202) 663-4114. Only comments of six or fewer pages will be accepted via FAX transmittal, in order to assure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 921-2815 (voice), 1-800-669-6820 (TTY), or 1-844-234-5122 (ASL video phone).
- Mail: Shelley E. Kahn, Acting Executive Officer, Executive Secretariat, U.S. Equal Employment Opportunity Commission, 131 M Street, NE, Washington, DC 20507.

- Hand Delivery / Courier: Shelley E. Kahn, Acting Executive Officer, Executive Officer, Executive Secretariat, U.S. Equal Employment Opportunity Commission, 131 M Street, NE, Washington, DC 20507.

Instructions: The Commission invites comments from all interested parties. All comment submissions must include the Regulatory Information Number (RIN) for this rulemaking. Comments need be submitted in only one of the above-listed formats. All comments received will be posted without change to <https://www.regulations.gov>, including any personal information you provide.

Docket: For access to comments received, go to <https://www.regulations.gov>. Copies of the received comments also will be available for review at the Commission's library, 131 M Street, NE, Suite 4NW08R, Washington, DC 20507, between the hours of 9:30 a.m. and 4:30 p.m., from [insert date 60 days after the date of publication in the FEDERAL REGISTER] until the Commission publishes the rule in final form. Members of the public may schedule a library appointment by sending an email to OEDA@eeoc.gov.

FOR FURTHER INFORMATION CONTACT: Kathleen Oram, Assistant Legal Counsel, at (202) 921-2665 or kathleen.oram@eeoc.gov, or Gary J. Hozempa, Senior Staff Attorney, at (202) 921-2672 or gary.hozempa@eeoc.gov, Office of Legal Counsel, U.S. Equal Employment Opportunity Commission. Requests for this document in an alternative format should be made to the EEOC's Office of Communications and Legislative Affairs at (202) 921-3191 (voice), 1-800-669-6820 (TTY), or 1-844-234-5122 (ASL video phone).

SUPPLEMENTARY INFORMATION:

Introduction

The Commission is issuing this notice of proposed rulemaking to amend its federal sector complaint processing regulations explicitly to authorize the Commission to

transmit its hearing and appellate decisions and other documents to registered complainants through the EEOC Electronic Public Portal (hereinafter “Public Portal” or “Portal”) in most cases as a matter of course. The proposed rule also requires agencies to notify complainants that they may use the Public Portal to file hearing requests and appeals and communicate with the Commission.

When the Commission revised 29 CFR part 1614 in 2012, it added paragraph (g) to § 1614.403. That paragraph generally requires agencies to submit complaint files and appeals to the EEOC’s Office of Federal Operations (“OFO”) in an acceptable digital format. Paragraph (g) also encourages appellants to submit digital appeals and supporting documents to OFO. The Federal Sector EEO Portal (FedSEP), an electronic portal available only to Federal agencies, was developed after § 1614.403(g) was promulgated. Its use by agencies has resulted in ease of access and communication, increased efficiency, and the elimination of paper.

The EEOC’s Public Portal was created after FedSEP and has been in existence for a number of years. Initially, the Public Portal was used by private sector respondents (employers, etc.) to submit certain documents to, and communicate with, the Commission. The Public Portal gradually acquired additional functionality, and private sector charging parties and respondents now use the Portal to communicate with the Commission and submit a wide variety of documents. Similarly, some federal sector complainants accepted the EEOC’s invitation set forth in § 1614.403(g) and use the Public Portal to request hearings, file appeals, and communicate with the EEOC’s Administrative Judges (“AJ”) and Office of Federal Operations (“OFO”).

Moreover, when a federal sector complainant mails a request for a hearing or an appeal, the AJ or OFO sends a letter acknowledging receipt and encourages the complainant to create a Public Portal account, explaining that documents can be uploaded and accessed using the Portal. In addition, when OFO issues an appellate decision, the

decision's "Statement of Rights" informs the complainant that the complainant may file a request for reconsideration and that the "[c]omplainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal" (the complainant also is informed that, in lieu of using the portal, the complainant may send the request by regular or certified mail).

The revisions proposed herein recognize the increased use of technology by the Commission, federal sector complainants, and agencies, by explicitly providing for digital transmission of complaint files, hearing requests, and associated hearing documents, appeals, briefs, and Commission decisions. In addition, the proposed revisions represent the Commission's commitment to expanding its use of technology and improving its service to the public. If implemented, these revisions would update the regulations to reflect the EEOC's current practices regarding the digital exchange of documents with agencies and some federal sector complainants. They also would make clear that receipt by digital means of hearing requests, appeals, and Commission hearing and appellate decisions, as well as other related documents, is equivalent to receipt by first class mail.

Currently, 29 CFR 1614.109(i) provides that an Administrative Judge "shall send copies of the hearing . . . decision to the parties." Additionally, 29 CFR 1614.405(a) provides that a Commission appellate decision will be "transmitted to the complainant and the agency by first class mail." In order to authorize the use of FedSEP and the Portal to issue decisions, the NPRM proposes specifying in § 1614.109(i) that hearing decisions may be transmitted through the Portal or by first class mail, and clarifying in § 1614.405(a) that, for complainants who are registered with the Portal, service through the Portal will be the preferred method of service. The NPRM also proposes that the Commission confirm it will provide decisions by first class mail to complainants not registered with the Portal or who prefer receipt by first class mail.

Regarding the issuance of appellate decisions, the Commission concludes that, under section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16, it may use the Public Portal to transmit federal sector final Commission decisions to complainants. Section 717(c), 42 U.S.C. 2000e-16(c), states: “[w]ithin 90 days of receipt of notice of final action taken . . . by the Equal Employment Opportunity Commission . . . an employee or applicant for employment . . . may file a civil action” *See also* 29 CFR 1614.407(c) (a complainant may file a civil action “within 90 days of receipt of the Commission’s final decision on an appeal.”). Thus, while section 717 directs the Commission to provide the complainant notice of its final decision, it does not prescribe how the Commission must provide that notice.

To encourage use of the Portal, the NPRM proposes revising § 1614.108(f) to provide that an agency must inform a federal sector complainant that a hearing request can be transmitted through the Portal. The NPRM also proposes revising § 1614.108(h) to clarify that a hearing request can be filed using the Portal and adding a paragraph to § 1614.110 specifying that an agency must inform a complainant that an appeal can be filed with OFO through the Portal. In addition, the NPRM proposes amending § 1614.204(e) to allow agencies to use digital methods (e.g. email), in addition to the non-digital methods listed therein, to notify class members that an Administrative Judge has accepted a class complaint.

The NPRM further proposes adding new paragraph (d) to § 1614.604 to make clear that parties, AJs, and OFO may use digital methods in addition to, or in lieu of, those listed in the designated rules, to communicate and transmit documents during the hearing or appeal stages. With respect to complainants who have not registered through the Public Portal or who, having registered, inform OFO that they prefer receipt via first class mail, OFO will continue to use first class mail to communicate and send documents, even while transmitting the same document to the agency via FedSEP.

Finally, the Commission especially seeks comments regarding whether its final rule should add a new subsection addressing when receipt of a Commission decision transmitted through the Portal is deemed to occur. For example, the U.S. Merit Systems Protection Board's rule pertaining to electronic filing states that "MSPB documents served electronically on registered e-filers are deemed received on the date of electronic submission." 5 CFR 1201.14(m)(2). Receipt of a Commission decision could be deemed to occur instead when a complainant accesses the decision for the first time. Or a rule could state that a Commission decision is deemed to be received when the complainant accesses the decision, or within 5 days of when the decision is uploaded to the Portal, whichever occurs first (such a rule would be modeled on the Commission's rule about mailed documents, 29 CFR 1614.604(b), which states that "in the absence of a legible postmark, [a document is deemed timely filed] if it is received by mail within five days of the expiration of the applicable filing period.")). If commenters think that the final rule should not address a receipt date, the Commission is interested in hearing that opinion as well.

Currently, regardless of whether a complainant is registered with the Portal, OFO uploads all appellate records (e.g., briefs, other relevant documents, decisions) to the Portal. If OFO has a complainant's or representative's email address, the Commission transmits a notification that a document has been added to the Portal. Should the Commission implement this proposed rule, OFO will continue this practice. Upon receiving an email notice, registered complainants and representatives can log onto their Portal accounts and click a link to review and download the uploaded document.

Additionally, should this proposed rule become final, the Commission will notify complainants with registered Portal accounts that they will be able to access documents, orders, and decisions from the Commission only via the Portal. If, in response, a registered complainant informs the Commission that the complainant would prefer

receipt through first class mail, the Commission will communicate with the complainant using first class mail.

Finally, the Commission recognizes that not all complainants will have access to the technology necessary to avail themselves of the Public Portal. For these reasons, as set forth in the NPRM, the Commission is not making use of the Public Portal mandatory and will issue decisions via first-class mail to complainants who do not have registered Portal accounts. Complainants who do not register with the Portal will be able to file hearing requests, appeals, and related documents through the current methods available (first class and registered mail, facsimile, personal delivery, and email).

Regulatory Procedures

Executive Order 12866

The Commission has complied with the principles in section 1(b) of Executive Order 12866, Regulatory Planning and Review. This NPRM is not a “significant regulatory action” under section 3(f) of the order and does not require an assessment of potential costs and benefits under section 6(a)(3) of the order.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) (PRA) applies to rulemakings in which an agency creates a new paperwork burden on regulated entities or modifies an existing burden. This final rule contains no new information collection requirements on the public, and therefore, will create no new paperwork burdens or modifications to existing burdens that are subject to review by the Office of Management and Budget under the PRA.

Regulatory Flexibility Act

The Commission certifies under 5 U.S.C. 605(b) that this NPRM will not have a significant economic impact on a substantial number of small entities because it applies exclusively to employees, applicants for employment, and agencies of the Federal

Government and does not impose a burden on any business entities. For this reason, a regulatory flexibility analysis is not required.

Unfunded Mandates Reform Act of 1995

This NPRM will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

This NPRM does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a “rule” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 29 CFR Part 1614

Administrative practice and procedure, Age discrimination, Color discrimination, Equal employment opportunity, Equal pay, Genetic information discrimination, Government employees, Individuals with disabilities, National origin discrimination, Race discrimination, Religious discrimination, Sex discrimination.

Accordingly, for the reasons set forth in the preamble, the Equal Employment Opportunity Commission proposes to amend chapter XIV of title 29 of the Code of Federal Regulations as follows:

PART 1614 – FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY

[AMENDED]

1. The authority citation for 29 CFR part 1614 continues to read as follows:

Authority: 29 U.S.C. 206(d), 633a, 791 and 794a; 42 U.S.C. 2000e-16 and 2000ff-6(e); E.O. 10577, 3 CFR, 1954-1958 Comp., p. 218; E.O. 11222, 3 CFR, 1964-1965 Comp., p. 306; E.O. 11478, 3 CFR, 1969 Comp., p. 133; E.O. 12106, 3 CFR, 1978 Comp., p. 263; Reorg. Plan No. 1 of 1978, 3 CFR, 1978 Comp., p. 321.

2. Amend § 1614.108 by:

a. Adding a sentence at the end of paragraph (f); and “

b. Adding at the end of the first sentence in paragraph (h) the words “or by filing a request for a hearing through the EEOC Public Portal.”

The additions read as follows:

§ 1614.108 Investigation of complaints.

(f)*** The notice that the complainant has the right to request a hearing and decision from an administrative judge shall inform the complainant that the hearing request may be filed using the EEOC Public Portal, available at <https://publicportal.eeoc.gov>.

(h)*** or by filing a request for a hearing through the EEOC Public Portal. ***

§ 1614.109 [Amended]

3. In § 1614.109 paragraph (i) in the second sentence removing the word “send” and adding in its place the word “transmit”.

4. In § 1614.110 add paragraph (c) to read as follows:

§ 1614.110 Final action by agencies.

(c) When an agency takes final action by issuing a final order or decision that requires the agency to include a notice that the complainant has the right to file an appeal

with the EEOC, the notice shall inform the complainant that the appeal may be filed using the EEOC Public Portal, available at <https://publicportal.eeoc.gov>.

§ 1614.204 [Amended]

5. Amend § 1614.204 paragraph (e)(1) by removing the word “or” after “address” and adding in its place “,”, and adding after the word “distribution” the words “, or digital transmission,”.

§ 1614.403 [Amended]

6. Amend § 1614.403 paragraph (a) by adding the words “through FedSEP or the EEOC’s Public Portal, as applicable,” after the word “electronically”.

7. Amend § 1614.405 by:

a. Removing in the last sentence of paragraph (a), the second appearance of the words “or her”, and removing the words “by first class mail”, and

b. Adding a new sentence at the end of paragraph (a).

The additions read as follows:

§ 1614.405 Decisions on appeals.

(a)*** For complainants who are not registered with the EEOC Public Portal, or who are registered but inform the Commission they prefer receipt by first class mail, the decision will be transmitted by first class mail. For all other complainants who are registered with the Public Portal, the decision will be transmitted via the Portal. The Commission will transmit the decision to the agency via FedSEP

8. Amend § 1614.604 by:

a. Redesignating paragraphs (c) and (d) as paragraphs (e) and (f).

b. Adding new paragraph (c) and (d).

The additions read as follows:

§ 1614.604 Filing and computation of time.

* * * * *

(c) An appeal, brief, or other document filed by an agency using FedSEP, or filed by a complainant using the EEOC Public Portal, shall be deemed filed on the date the document is uploaded to FedSEP or the Public Portal.

(d) For the purposes of §§ 1614.108 and 1614.109, and §§ 1614.401 through 1614.405, the terms *accept, file, filed, filing, issue, issuance, issuing, notify, notified, receive, receipt, send, serve, served, service, submit, submission, submitted, transmit, and transmitted*, shall include digital transmissions made through FedSEP or the EEOC Public Portal.

Dated: September 8, 2022

Charlotte A. Burrows

Chair

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